United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-1778

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In The

United States Court of Appeals

For The Second Circuit

CORWIN CONSULTANTS, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and

SAMUEL A. CULBERTSON, II,

Appellee-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR APPELLANT, CORWIN CONSULTANTS, INC.

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CORWIN CONSULTANTS, INC.,

Docket No.
74-1778

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REPLY BRIEF FOR APPELLANT CORWIN CONSULTANTS, INC.

The parties agree that the sole issue on this appeal is whether the Internal Revenue Service filed its notices of federal tax lien as to Harper's 1963, 1964 and 1965 taxes in the proper places in order to perfect the priority of its lien as against Corwin's lien as a judgment creditor.

Respondent United States of America acknowledges

that its filings were not in conformity with 26 USC §§ 6321 and 6323, but asked the Court below to permit it to perfect its lien by filing in the jurisdiction where the property was physically located, instead of the place where the statutes require such filing to be made. The USA argues that such filing as it made, met constitutional requirements of notice, and should be deemed sufficient, where the taxpayer's residence is unknown.

Corwin does not dispute that the steps taken by the USA were reasonable, and, had the statute so provided, those steps would doubtless have been constitutional. What is at issue here, however, is whether the clear language of statutory law is to be ignored to suit the convenience of I.R.S.

The USA argues that the term "residence" should be construed to mean either "last known address" or "last known residence". This is a smoke screen. The USA filed its notices with the taxpayer's debtor, Interpublic. This was a filing at the situs of the property; it was not then, or ever, the place of the taxpayer's residence.

In effect the USA wants the best of both worlds. When it is convenience, it will perfect its lien, as it may on a taxpayer's assets, attaching all of them, in all jurisdictions, by merely filing at the county of residence; since it was not convenient here, or even possible, for lack of knowledge as to the taxpayer's residence, the USA now wishes to file at the situs of the debt, a non-permissible place of filing.

We apply the "smoke screen" appellation to the USA's attempt to have the Court construe "residence" as synonymous with "last known address", because no Court has ever taken seriously the suggestion that a brief stay at a hotel, established any constitutional basis for regarding a notice addressed to the hotel as a notice addressed to a "residence". Service of process by "nail and mail" at such an address, could hardly be expected to bring to a taxpayer's attention, the pendency of legal proceedings.

The record is devoid of evidence that Harper resided at any of the five addresses suggested by the USA. This is substantially acknowledged by USA by the "addendum"

attached to their brief, where at long last, three months after Corwin's lien was perfected, USA made a levy based on a residence for Harper at La Crique, Switzerland. We leave it to other appellants to comment on the inclusion of new matter in the record (a) by an addendum to the brief on appeal, and (b) by seeking to describe one of the alleged addresses as "the home of Harper's parents" (page 6, brief of USA).

Should this Court rule against Corwin, the net effect would be to rewrite 26 USC § 6323 by deleting paragraph (f) (2) (B) which provides that the property is situated (for the purposes of perfecting tax liens) at the residence of the taxpayer. The USA would have the Court rewrite the statute to create a new procedure when it is inconvenient for the I.R.S. to use the existing statutory procedure.

Corwin believes that this Court will not be misled by the USA's argument of dire consequences to follow if Corwin wins. Indeed, since this is a case of first impression,

the problem can hardly be regarded as occurring with such frequency that requiring the USA to observe the statute becomes a dire consequence.

Corwin believes that the USA is sufficiently protected by existing statutes, and the fact that a creditor, not the taxpayer, has acquired priority over a tax lien should not be distorted into an allegation that "...in any case where his residence is unknown (or he makes himself scarce) would allow tax evasion by the mere disappearance of the taxpayer". (Decision below, Record p. 148a).

Our concern here is not with an evading taxpayer who preserves his assets by going into hiding. The taxpayer here is losing the asset in question, regardless of the determination of priorities among various claimants to the asset.

Finally, counsel for Corwin feel the unfortunate necessity of defending ourselves from unwarranted criticism. At page 7 of the USA's brief, the circumstances of the filings, by the USA and by Corwin, on October 3, 1972, conclude with the remark "Thus, if Corwin had been more diligent in

perfecting its judgment lien, we would not be here today".

Between the time Corwin filed its restraining notice, pursuant to the CPLR, and October 3, 1972, counsel for Corwin met with counsel for Interpublic and two representatives of the I.R.S. Counsel for Corwin were informed that liens already filed by the I.R.S. were in excess of $400,000, and would, with interest and penalties, absorb the entire amount of the fund. In that light, there was no need for any rush to file.

We do not criticize Mr. Barkan for his observations, since he was not present at the meeting above described, but had counsel for Corwin not been informed by I.R.S. (incorrectly) that it had validly filed liens, Corwin would undoubtedly have perfected its judgment lien sooner. However, Corwin's lien has priority, unless the Court rewrites the statutes.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment below be modified to the extent of awarding the Corwin judgment lien priority over the federal tax lien for taxes due for the years 1963, 1964 and 1965.

Respectfully submitted,

BENEDICT GINSBERG
Attorney for Appellant Corwin

Charles E. Ramos, Esq.
With him on the brief

Dated: New York, N. Y.
November 14, 1974.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 15th day of November 1974 at *

deponent served the annexed REPLY BRIEF upon

*

the Attorneys in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega
Print name beneath signature

Sworn to before me, this 15th day of November 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

VICTOR ORTEGA

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Foley Square, New York, N.Y.

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